

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Mar 29, 2021**

**UNITED STATES DISTRICT COURT** SEAN F. McAVOY, CLERK  
**EASTERN DISTRICT OF WASHINGTON**

ERIN H.,<sup>1</sup>

Plaintiff,

vs.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:20-cv-00191-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 19, 20

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 19, 20. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing,

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court denies Plaintiff's  
2 motion, ECF No. 19, and grants Defendant's motion, ECF No. 20.

### 3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
5 1383(c)(3).

### 6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social  
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
9 limited; the Commissioner's decision will be disturbed "only if it is not supported  
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
13 (quotation and citation omitted). Stated differently, substantial evidence equates to  
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
15 citation omitted). In determining whether the standard has been satisfied, a  
16 reviewing court must consider the entire record as a whole rather than searching  
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its  
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are  
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674  
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an  
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless  
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."  
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's  
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within  
11 the meaning of the Social Security Act. First, the claimant must be "unable to  
12 engage in any substantial gainful activity by reason of any medically determinable  
13 physical or mental impairment which can be expected to result in death or which  
14 has lasted or can be expected to last for a continuous period of not less than twelve  
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's  
16 impairment must be "of such severity that he is not only unable to do his previous  
17 work[,] but cannot, considering his age, education, and work experience, engage in  
18 any other kind of substantial gainful work which exists in the national economy."  
19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to  
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis  
9 proceeds to step two. At this step, the Commissioner considers the severity of the  
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
11 claimant suffers from "any impairment or combination of impairments which  
12 significantly limits [his or her] physical or mental ability to do basic work  
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to  
17 severe impairments recognized by the Commissioner to be so severe as to preclude  
18 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
20

1 severe than one of the enumerated impairments, the Commissioner must find the  
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the  
4 severity of the enumerated impairments, the Commissioner must pause to assess  
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing work that he or she has performed in  
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
13 If the claimant is capable of performing past relevant work, the Commissioner  
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
15 If the claimant is incapable of performing such work, the analysis proceeds to step  
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's  
18 RFC, the claimant is capable of performing other work in the national economy.  
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
20 the Commissioner must also consider vocational factors such as the claimant's age,

education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that 1) the claimant is capable of performing other work; and 2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### ALJ’S FINDINGS

On September 12, 2017, Plaintiff applied both for Title II disability insurance benefits and Title XVI supplemental security income benefits alleging a disability onset date of June 25, 2017.<sup>2</sup> Tr. 15, 152, 287-302. The applications

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<sup>2</sup> Plaintiff previously applied for benefits, first on April 1, 2008, which resulted in an ALJ rendering a partially favorable decision on November 25, 2009; Plaintiff was found disabled during a closed period of January 12, 2008 through April 1,

1 were denied initially and on reconsideration. Tr. 206-09, 218-23. Plaintiff  
2 appeared before an administrative law judge (ALJ) on January 11, 2019. Tr. 46-  
3 104. On February 15, 2019, the ALJ denied Plaintiff's claim. Tr. 12-33.

4 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
5 who met the insured status requirements through December 31, 2022, has not  
6 engaged in substantial gainful activity since June 25, 2017. Tr. 17. At step two,  
7 the ALJ found that Plaintiff has the following severe impairments: myopia, post-  
8 traumatic arthritis of the left shoulder, and cervical and lumbar degenerative disc  
9 disease. *Id.*

10 At step three, the ALJ found Plaintiff does not have an impairment or  
11 combination of impairments that meets or medically equals the severity of a listed  
12 impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform  
13 light work with the following limitations:

14 [Plaintiff] cannot climb ladders, ropes, or scaffolds; she can frequently  
15 balance, and occasionally perform all other postural activities; with

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16 2009. Tr. 106-24. Plaintiff again applied for benefits on April 9, 2010, which  
17 resulted in an ALJ rendering a fully favorable decision on January 27, 2012;  
18 Plaintiff was found disabled during a closed period of November 26, 2009 through  
19 June 30, 2011. Tr. 125-35. Plaintiff returned to full-time work beginning July 1,  
20 2011. Tr. 134.

1 the left upper extremity, she can frequently push and pull, and  
2 occasionally reach overhead; with the right upper extremity, she has  
3 unlimited ability to push and pull, and can frequently reach overhead;  
4 she can frequent[ly] handle bilaterally; she can frequently operate foot  
5 controls; she cannot perform tasks that require precise visual acuity,  
6 such as threading a needle or reading print smaller than regular  
7 newspaper print; and she can have no exposure to vibration, extreme  
8 cold, or hazards, such as unprotected heights and moving mechanical  
9 parts.

10 Tr. 20.

11 At step four, the ALJ found Plaintiff is unable to perform any of her past  
12 relevant work. Tr. 25. At step five, the ALJ found that, considering Plaintiff's  
13 age, education, work experience, RFC, and testimony from the vocational expert,  
14 there were jobs that existed in significant numbers in the national economy that  
15 Plaintiff could perform, such as usher, photocopy machine operator, and mail  
16 clerk. Tr. 26. In the alternative, the ALJ found that if Plaintiff was limited to  
17 sedentary work with additional limitations, there were still jobs that existed in  
18 significant numbers in the national economy that Plaintiff could perform, such as  
19 document preparer, food and beverage order clerk, and addresser. Tr. 27.  
20 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the  
Social Security Act, from the alleged onset date of June 25, 2017, through the date  
of the decision. *Id.*



1 On March 31, 2020, the Appeals Council denied review of the ALJ's  
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

#### 4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 her disability insurance benefits under Title II and supplemental security income  
7 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
8 issues for review:

9 1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and

10 2. Whether the ALJ properly evaluated the medical opinion evidence.

11 ECF No. 19 at 16.

#### 12 DISCUSSION

##### 13 A. Plaintiff's Symptom Claims

14 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
15 convincing in discrediting her symptom claims. ECF No. 19 at 17-18. An ALJ  
16 engages in a two-step analysis to determine whether to discount a claimant's  
17 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
18 "First, the ALJ must determine whether there is objective medical evidence of an  
19 underlying impairment which could reasonably be expected to produce the pain or  
20 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).

1 “The claimant is not required to show that [the claimant’s] impairment could  
2 reasonably be expected to cause the severity of the symptom [the claimant] has  
3 alleged; [the claimant] need only show that it could reasonably have caused some  
4 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

5 Second, “[i]f the claimant meets the first test and there is no evidence of  
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
9 omitted). General findings are insufficient; rather, the ALJ must identify what  
10 symptom claims are being discounted and what evidence undermines these claims.  
11 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*  
12 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently  
13 explain why it discounted claimant’s symptom claims)). “The clear and  
14 convincing [evidence] standard is the most demanding required in Social Security  
15 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*  
16 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 Factors to be considered in evaluating the intensity, persistence, and limiting  
18 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
19 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
20 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and

1 side effects of any medication an individual takes or has taken to alleviate pain or  
2 other symptoms; 5) treatment, other than medication, an individual receives or has  
3 received for relief of pain or other symptoms; 6) any measures other than treatment  
4 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
5 factors concerning an individual's functional limitations and restrictions due to  
6 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§  
7 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in  
8 an individual's record," to "determine how symptoms limit ability to perform  
9 work-related activities." SSR 16-3p, 2016 WL 1119029, at \*2.

10 The ALJ found that Plaintiff's medically determinable impairments could  
11 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's  
12 statements concerning the intensity, persistence, and limiting effects of her  
13 symptoms were not entirely consistent with the evidence. Tr. 21.

14 In her opening brief, Plaintiff challenged only the ALJ's conclusion that  
15 Plaintiff's activities of daily living were inconsistent with Plaintiff's symptom  
16 complaints. ECF No. 19 at 17-18. Plaintiff challenged the additional reasons in  
17 her reply brief, ECF No. 21 at 2-8. As Plaintiff failed to raise the challenges in the  
18 opening brief to the four other reasons the ALJ cited in support of his finding that  
19 Plaintiff's symptom complaints were not entirely credible, any challenges are  
20 waived and the Court may decline to review them. *See Carmickle v. Comm'r, Soc.*

1 *Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). However, upon review, the  
2 Court finds that the ALJ provided specific, clear, and convincing reasons,  
3 supported by substantial evidence, to support his finding. Tr. 21-23.

4 *1. Inconsistent Statements*

5 The ALJ found Plaintiff made inconsistent statements about her symptoms  
6 and limitations. Tr. 21-22. In evaluating a claimant's symptom claims, an ALJ  
7 may consider the consistency of an individual's own statements made in  
8 connection with the disability-review process with any other existing statements or  
9 conduct under other circumstances. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th  
10 Cir. 1996) (The ALJ may consider "ordinary techniques of credibility evaluation,"  
11 such as reputation for lying, prior inconsistent statements concerning symptoms,  
12 and other testimony that "appears less than candid.").

13 The ALJ noted that while Plaintiff alleges an inability to work since June 25,  
14 2017, she told her treating physician in August 2017 that she was employed as a  
15 nursing assistant, which required moderate physical activity, and she was satisfied  
16 with the work. Tr. 21-22 (citing Tr. 464, 614). However, Plaintiff's work as  
17 nursing assistant appears under "social history", Tr. 614, and "work history," Tr.  
18 464, and Plaintiff's earnings record indicates Plaintiff had earnings in the first and  
19 second quarters of 2017, and there are no earnings in the third quarter of 2017,  
20 which is consistent with Plaintiff's reports that her work ended in June 2017, Tr.

1 310. The ALJ's finding that Plaintiff gave inconsistent statements about her work  
2 is not supported by substantial evidence. However, any error is harmless as the  
3 ALJ gave other supported reasons to reject Plaintiff's symptom claims. *See*  
4 *Molina*, 674 F.3d at 1115.

5 The ALJ also found Plaintiff's allegation that she had been having four  
6 seizures per month since mid-2016 was inconsistent with her testimony that she  
7 continued driving until September 2017, and her report to a provider that she was  
8 still driving in January 2018. Tr. 22 (citing Tr. 593). Plaintiff testified at the  
9 hearing that she stopped driving "maybe" in October 2017, Tr. 86, but also  
10 reported in January 2018 to a provider that she is able to drive during the day but  
11 not after the sun goes down because of her seizures, and she reported she does not  
12 drive far because she tends to get tired, Tr. 593. On this record, the ALJ  
13 reasonably concluded that Plaintiff made inconsistent statements about her ability  
14 to drive. This finding is supported by substantial evidence and was a clear and  
15 convincing reason to discount Plaintiff's symptom complaints.

16 *2. Inconsistent Objective Evidence*

17 The ALJ found the objective medical evidence is inconsistent with  
18 Plaintiff's symptom claims. Tr. 22. An ALJ may not discredit a claimant's  
19 symptom testimony and deny benefits solely because the degree of the symptoms  
20 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261

1 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
2 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400  
3 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a  
4 relevant factor, along with the medical source's information about the claimant's  
5 pain or other symptoms, in determining the severity of a claimant's symptoms and  
6 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),  
7 416.929(c)(2).

8       The ALJ found the objective evidence does not support Plaintiff's allegation  
9 that she has three to five seizures per month. Tr. 22. Plaintiff's MRIs and EEGs  
10 were consistently within normal limits, with no evidence of seizure activity. *Id.*  
11 (citing Tr. 462, 612). Plaintiff had mild diffuse slowing on one occasion but had  
12 no epileptiform abnormalities. Tr. 22 (citing Tr. 612, 616). On another occasion,  
13 Plaintiff reported having a five-minute seizure, but Dr. Cairns observed Plaintiff  
14 appeared alert and did not appear significantly postictal. Tr. 22 (citing Tr. 678).

15       While the ALJ found the objective evidence does not support Plaintiff's  
16 allegations of four seizures per month due to epilepsy, the ALJ noted that Dr.  
17 Sparrow suspected Plaintiff's events were not epileptic in nature. Tr. 22 (citing Tr.  
18 615). Dr. Johnson also found Plaintiff's visual fields impairment had a non-  
19 physiological cause. Tr. 22 (citing Tr. 675). Dr. McKenna testified that there was  
20 not evidence to support a diagnosis of a seizure disorder and noted Plaintiff's

1 providers thought her seizures may be psychogenic. Tr. 65. However, the ALJ  
2 noted that Plaintiff did not follow-up with the extended EEG that was  
3 recommended to determine if the seizures were epileptic or psychogenic, and  
4 Plaintiff did not seek mental health treatment. Tr. 22-23. As such, there is not  
5 objective evidence to support disabling limitations due to psychogenic seizures.  
6 On this record, the ALJ reasonably concluded that the objective medical evidence  
7 is not consistent with Plaintiff's complaints of disabling symptoms. This finding is  
8 supported by substantial evidence and was a clear and convincing reason to  
9 discount Plaintiff's symptom claims.

### 10 3. *Lack of Treatment*

11 The ALJ found Plaintiff's lack of treatment is inconsistent with her symptom  
12 claims. Tr. 22. An unexplained, or inadequately explained, failure to seek  
13 treatment or follow a prescribed course of treatment may be considered when  
14 evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638  
15 (9th Cir. 2007). And evidence of a claimant's self-limitation and lack of  
16 motivation to seek treatment are appropriate considerations in determining the  
17 credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240  
18 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, \*3 (9th  
19 Cir. 2009) (unpublished opinion) (considering why plaintiff was not seeking  
20 treatment). When there is no evidence suggesting that the failure to seek or

1 participate in treatment is attributable to a mental impairment rather than a  
2 personal preference, it is reasonable for the ALJ to conclude that the level or  
3 frequency of treatment is inconsistent with the alleged severity of complaints.  
4 *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental  
5 health treatment is partly due to a claimant's mental health condition, it may be  
6 inappropriate to consider a claimant's lack of mental health treatment when  
7 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100  
8 F.3d 1462, 1465 (9th Cir. 1996).

9 At her February 2019 hearing, Plaintiff testified she had not sought  
10 treatment for her seizures since February 2018 and had not sought any other  
11 medical treatment since May 2018. Tr. 22, 51. Although an extended EEG was  
12 recommended, Plaintiff did not have the EEG performed and she could not explain  
13 why, though she stated she guessed the EEG request was probably declined by her  
14 insurance, but she did not know if the insurance denial was appealed. Tr. 23, 67-  
15 68. Plaintiff testified she could not get additional neurological treatment covered  
16 until she obtained the EEG. Tr. 68. Plaintiff argues she did not have any gaps in  
17 her treatment but does not explain why there are no medical records from May  
18 2018 through the February 2019 hearing. ECF No. 21 at 3-4. Plaintiff also has not  
19 sought mental health treatment, despite her providers indicating her symptoms may  
20 be due to psychogenic causes. Tr. 22, 98-99. Plaintiff testified she has never been



1 told to seek mental health treatment and she does not feel she needs it. Tr. 98-99.  
2 The ALJ's finding that Plaintiff's lack of treatment is inconsistent with her  
3 allegation of disabling seizures is a clear and convincing reason, supported by  
4 substantial evidence, to reject Plaintiff's symptom claims.

5 *4. Symptom Exaggeration*

6 The ALJ found Plaintiff exaggerated her symptoms. Tr. 22. Evidence of  
7 being motivated by secondary gain is sufficient to support an ALJ's rejection of  
8 testimony evidence. *See Matney*, 981 F.2d at 1020. Therefore, the tendency to  
9 exaggerate or engage in manipulative conduct during the process is a permissible  
10 reason to discount the credibility of the claimant's reported symptoms.

11 *Tonapetyan*, 242 F.3d at 1148.

12 The ALJ noted the medical records contained evidence of symptom  
13 magnification and a focus on secondary gain. Tr. 22 (citing Tr. 590, 600, 615).  
14 During her psychological consultative examination, the examiner observed  
15 Plaintiff was less helpless appearing in the waiting room than she was during her  
16 examination, and Plaintiff then became annoyed and upset during the examination.  
17 Tr. 590. During her physical consultative examination, Plaintiff exhibited poor  
18 effort on the range of motion testing, exhibited exaggerated pain behavior  
19 throughout the examination, and the examiner noted multiple inconsistencies in  
20 Plaintiff's behavior including her ability to put on her jacket without difficulty and

1 with improved shoulder range of motion despite Plaintiff having restricted range of  
2 motion on examination. Tr. 600. The examiner noted Plaintiff gave poor effort on  
3 her examination. Tr. 601. When seeking treatment for her seizures, Plaintiff and  
4 her mother reported she was applying for disability benefits and needed to obtain  
5 the treatment records for Plaintiff's application for benefits. Tr. 615. This was a  
6 clear and convincing reason, supported by substantial evidence, to reject Plaintiff's  
7 symptom claims.

8 *5. Activities of Daily Living*

9 The ALJ found Plaintiff's activities of daily living were inconsistent with  
10 her symptom claims. Tr. 22. The ALJ may consider a claimant's activities that  
11 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a  
12 substantial part of the day engaged in pursuits involving the performance of  
13 exertional or non-exertional functions, the ALJ may find these activities  
14 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,  
15 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to  
16 be eligible for benefits, the ALJ may discount a claimant's symptom claims when  
17 the claimant reports participation in everyday activities indicating capacities that  
18 are transferable to a work setting" or when activities "contradict claims of a totally  
19 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

1 The ALJ noted Plaintiff reported she was able to independently perform  
2 basic housework, laundry, meal preparation, animal care, shopping, and financial  
3 management. Tr. 22 (citing Tr. 369-76). However, Plaintiff reported receiving  
4 assistance from her family members for many of the activities and reported  
5 significant difficulties with the activities. Tr. 369-76. However, any error is  
6 harmless as the ALJ gave other supported reasons to reject Plaintiff's symptom  
7 claims. *See Molina*, 674 F.3d at 1115. Plaintiff is not entitled to remand on these  
8 grounds.

#### 9 **B. Medical Opinion Evidence**

10 Plaintiff contends the ALJ erred in his analysis of the opinions of Michael  
11 Clark, M.D. ECF No. 19 at 18-20. As an initial matter, for claims filed on or after  
12 March 27, 2017, new regulations apply that change the framework for how an ALJ  
13 must evaluate medical opinion evidence. *Revisions to Rules Regarding the*  
14 *Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18,  
15 2017); 20 C.F.R. §§ 404.1520c, 416.920c. The new regulations provide that the  
16 ALJ will no longer "give any specific evidentiary weight...to any medical  
17 opinion(s)..." *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-  
18 68; *see* 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, an ALJ must consider  
19 and evaluate the persuasiveness of all medical opinions or prior administrative  
20 medical findings from medical sources. 20 C.F.R. §§ 404.1520c(a) and (b),

1 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical  
2 opinions and prior administrative medical findings include supportability,  
3 consistency, relationship with the claimant (including length of the treatment,  
4 frequency of examinations, purpose of the treatment, extent of the treatment, and  
5 the existence of an examination), specialization, and “other factors that tend to  
6 support or contradict a medical opinion or prior administrative medical finding”  
7 (including, but not limited to, “evidence showing a medical source has familiarity  
8 with the other evidence in the claim or an understanding of our disability  
9 program’s policies and evidentiary requirements”). 20 C.F.R. §§ 404.1520c(c)(1)-  
10 (5), 416.920c(c)(1)-(5).

11 Supportability and consistency are the most important factors, and therefore  
12 the ALJ is required to explain how both factors were considered. 20 C.F.R. §§  
13 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in  
14 the regulations:

15 (1) *Supportability*. The more relevant the objective medical evidence  
16 and supporting explanations presented by a medical source are to  
17 support his or her medical opinion(s) or prior administrative medical  
18 finding(s), the more persuasive the medical opinions or prior  
19 administrative medical finding(s) will be.

18 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
19 administrative medical finding(s) is with the evidence from other  
20 medical sources and nonmedical sources in the claim, the more  
persuasive the medical opinion(s) or prior administrative medical  
finding(s) will be.

20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how the other factors were considered. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2).<sup>3</sup> However, when two or more medical opinions

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<sup>3</sup> The parties disagree over whether Ninth Circuit case law continues to be controlling in light of the amended regulations. ECF No. 19 at 17-20; ECF No. 20 at 13-18. Plaintiff cited exclusively to case law that applied the prior regulations, ECF No. 19 at 17-20, and argues the change in the regulations does not overrule prior case law, ECF No. 21 at 9, while Defendant argues the prior case law does not apply to the new regulations, ECF No. 20 at 13-18. The Court finds resolution of this question unnecessary to the disposition of this case. “It remains to be seen whether the new regulations will meaningfully change how the Ninth Circuit determines the adequacy of the an ALJ’s reasoning and whether the Ninth Circuit will continue to require that an ALJ provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis of medical opinions, or some variation of those standards.” *Allen T. v. Saul*, No. EDCV 19-1066-KS, 2020 WL 3510871, at \*3 (C.D. Cal. June 29, 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at \*3 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer to the new regulations, even where they conflict with prior judicial precedent, unless the prior judicial construction follows from the

1 or prior administrative findings “about the same issue are both equally well-  
2 supported ... and consistent with the record ... but are not exactly the same,” the  
3 ALJ is required to explain how “the other most persuasive factors in paragraphs  
4 (c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3),  
5 416.920c(b)(3).

6 On January 14, 2018, Dr. Clark examined Plaintiff and rendered an opinion  
7 on Plaintiff’s psychological functioning. Tr. 590-96. Dr. Clark diagnosed Plaintiff  
8 with unspecified depressive disorder, unspecified anxiety disorder, and possible  
9 unspecified cluster C personality disorder. Tr. 595. Dr. Clark opined Plaintiff is  
10 able to manage her own funds, but she would appear to have some difficulties  
11 performing simple/repetitive tasks; he has significant doubts about Plaintiff’s  
12 ability to perform detailed and complicated tasks; Plaintiff would probably have  
13 difficulty accepting instructions from supervisors; she would probably have

14 \_\_\_\_\_  
15 unambiguous terms of the statute and thus leaves no room for agency discretion.’”  
16 *Allen T.*, at \*3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*  
17 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58  
18 (2d Cir. 1993) (“New regulations at variance with prior judicial precedents are  
19 upheld unless ‘they exceeded the Secretary’s authority [or] are arbitrary and  
20 capricious.’”).

1 significant difficulty interacting with coworkers and the public; she would not have  
2 difficulty performing work activities without special/additional instructions, but  
3 she would probably have difficulty maintaining regular attendance and completing  
4 a normal workday/workweek without interruptions from a psychiatric condition;  
5 she would likely have difficulty dealing with the usual stress in the workplace; and  
6 her symptoms/limitations are unlikely to dissipate within 12 months. Tr. 595-96.  
7 The ALJ found Dr. Clark's opinion was not persuasive. Tr. 25.

8 First, the ALJ found Dr. Clark's opinion was inconsistent with Plaintiff's  
9 presentation, behavior, and examination results. Tr. 25. Supportability is one of  
10 the most important factors an ALJ must consider when determining how  
11 persuasive a medical opinion is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2).  
12 The more relevant objective evidence and supporting explanations that support a  
13 medical opinion, the more persuasive the medical opinion is. 20 C.F.R. §§  
14 404.1520c(c)(1), 416.920c(c)(1).

15 The ALJ found Plaintiff's behavior during Dr. Clark's examination was  
16 uncooperative, Tr. 25, and noted the examination contained evidence of symptom  
17 magnification, Tr. 22. Dr. Clark observed that Plaintiff had appropriate behavior  
18 in the waiting room, and appeared less helpless in the waiting room, but began to  
19 behave in a helpless manner in the initial portion of the interview before becoming  
20 upset. Tr. 590. On examination, Dr. Clark noted Plaintiff was tangential, agitated,

1 defensive, helpless, hopeless, alert, and oriented. Tr. 593-94. Plaintiff had normal  
2 memory, fund of knowledge, and level of intelligence, and she made only one error  
3 on serial sevens but then became upset by the error and while still upset made an  
4 error while following a three-step command. *Id.* Plaintiff had normal judgment  
5 but did not appear to have much insight into her own difficulties. *Id.* While  
6 Plaintiff had some abnormalities on examination, Dr. Clark did not address how  
7 Plaintiff's potential symptom magnification impacted his opinion, despite noting  
8 her different behavior in the waiting room versus the examination room. As  
9 discussed *infra*, Plaintiff generally presented at her treatment appointments with  
10 normal mood, affect, behavior and without complaints of psychological symptoms,  
11 and such presentation is inconsistent with her presentation at Dr. Clark's  
12 examination. As such, the ALJ's finding that Dr. Clark's opinion is inconsistent  
13 with Plaintiff's presentation, behavior, and examination results was a specific and  
14 legitimate reason, supported by substantial evidence, to reject the opinion. *See*  
15 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Batson*  
16 *v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2003); *Thomas*, 278  
17 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d at 1019.

18 Second, the ALJ found Dr. Clark's opinion was inconsistent with the  
19 longitudinal record. Tr. 25. Consistency is one of the most important factors an  
20 ALJ must consider when determining how persuasive a medical opinion is. 20



1 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more consistent an opinion is  
2 with the evidence from other sources, the more persuasive the opinion is. 20  
3 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2). The ALJ noted treating sources  
4 generally found Plaintiff had no cognitive deficits, was pleasant, had a normal  
5 mood and affect, and was in no acute distress. Tr. 25. As indicated by the ALJ,  
6 the treatment records generally reflect normal psychological functioning, including  
7 normal mood, affect, memory, orientation, behavior, concentration, attention, fund  
8 of knowledge, speech, comprehension, insight, and judgment. Tr. 426, 465, 500,  
9 608, 614, 619. While Dr. Clark noted Plaintiff was tangential and difficult to get a  
10 history from, Tr. 592, treatment records indicate Plaintiff has an intact memory and  
11 is able to give a detailed history with goal-directed answers, Tr. 505, 510, 520,  
12 525, 534, 539. Plaintiff also has not sought any mental health treatment and  
13 testified that she does not feel she needs mental health treatment. Tr. 99. The  
14 ALJ's finding that Dr. Clark's opinion is inconsistent with the longitudinal record  
15 was a specific and legitimate reason, supported by substantial evidence to reject the  
16 opinion. *See Batson*, 359 F.3d at 1195.

17 Third, the ALJ found that the inclusion of additional mental limitations in  
18 the RFC would not be disabling. Tr. 25. Any error in failing to include a  
19 provider's opined limitation would be harmless "where it is inconsequential to the  
20 [ALJ's] ultimate nondisability determination." *See Molina*, 674 F.3d at 1115. The

1 ALJ posed a second hypothetical to the vocational expert that contained additional  
2 limitations, and the vocational expert testified there would still be available jobs  
3 that exist in significant numbers. Tr. 25. The hypothetical included the following  
4 limitations: “sedentary work . . . simple, routine tasks, with a reasoning level of 2  
5 or less; superficial contact with the public; occasional contact with coworkers; and  
6 could not have concentrated pulmonary irritants or wetness.” Tr. 101.

7 The ALJ reasonably interpreted Dr. Clark’s opinion as being accounted for  
8 by a limitation to simple, routine tasks, a reasoning level of two, and social  
9 limitations. Dr. Clark opined Plaintiff appears to have “some” difficulties with  
10 simple and repetitive tasks, and would have difficulties with detailed tasks, which  
11 was accounted for in the hypothetical. Tr. 101, 596. He opined Plaintiff would  
12 have difficulties with supervisors and would probably have difficulties with  
13 coworkers and the public, which the ALJ accounted for in the hypothetical with  
14 limitations to superficial public contact and occasional coworker contact. Tr. 101,  
15 596. As such, any error in rejecting most of Dr. Clark’s opinion would be  
16 harmless, as the opined limitations were not disabling. Dr. Clark also opined  
17 Plaintiff would “probably” have difficulty maintaining regular attendance and  
18 completing a normal workday/workweek but did not specify the amount of time  
19 Plaintiff would miss work or be off task. Tr. 596. Even if the attendance portion  
20 of the opinion was disabling, the ALJ gave two reasons, supported by substantial

1 evidence, why he found Dr. Clark's opinion was not persuasive; as such, any error  
2 in finding Dr. Clark's opinion was not disabling is harmless.

3 Plaintiff argues the ALJ erred in rejecting Dr. Clark's opinion, because the  
4 testifying medical expert opined Plaintiff's seizures are not epileptic and noted that  
5 providers believed Plaintiff's seizures may be psychogenic. ECF No. 19 at 19-20.  
6 Plaintiff contends that if Plaintiff's seizures are psychogenic, the ALJ erred in  
7 rejecting Dr. Clark's opinion. *Id.* However, Dr. Clark only noted that Plaintiff  
8 complained of seizures which he interpreted "to mean pseudoseizures given what  
9 little history I was provided," Tr. 590, and Dr. Clark did not diagnose Plaintiff with  
10 somatoform disorder or any other condition to account for pseudoseizures, Tr. 595.  
11 Plaintiff is not entitled to remand on these grounds.

## 12 CONCLUSION

13 Having reviewed the record and the ALJ's findings, the Court concludes the  
14 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

17 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is  
18 **GRANTED**.

19 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.  
20

1 The District Court Executive is directed to file this Order, provide copies to  
2 counsel, and **CLOSE THE FILE.**

3 DATED March 29, 2021.

4 *s/Mary K. Dimke*  
5 MARY K. DIMKE  
6 UNITED STATES MAGISTRATE JUDGE  
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